Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992 Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition	)	MI3 Docket No, 07-29

REPLY COMMENTS OF
QWEST COMMUNICATIONS INTERNATIONAL INC.

Qwest Communications International Inc. ("Qwest") hereby submits these reply comments with respect to the Federal Communications Commission's ("Commission") *Notice of Proposed Rulemaking* ("*NPRM*") in the above-captioned proceeding.[1]

With only isolated exceptions, the initial comments filed in response to the *NPRM* express overwhelming support for continued enforcement of Section 628(c)(2)(D) of the Communications Act of 1934, as amended, which prohibits cable operators from entering into exclusive contracts with programming vendors in which they hold a cognizable ownership interest.' As was the case when the Commission last reviewed this issue in 2002, cable's competitors have reaffirmed that the protection they are provided under Section 628(c)(2)(D) is

[1] *In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act; Sunset of Exclusive Contract Prohibition*, MB Docket No. 07-29, Notice of Proposed Rulemaking, FCC 07-7 (rel. Feb. 20, 2007); *see also* 40 Fed. Reg. 9289 (Mar. 1, 2007).

[2] 47 U.S.C. § 548(c)(2)(D).

essential for ensuring that consumers have a *bona fide* choice of multichannel video programming distributors ("MVPDs") in their communities. Conversely, the comments filed by the cable interests largely reiterate arguments that the Commission has previously rejected, or that simply cannot be squared with the record. The Commission therefore can and should declare that the prohibition on exclusivity in Section 628(c)(2)(D) "continues to be necessary to preserve and protect competition and diversity in the distribution of video programming,"[3] and that the agency will continue to enforce the statute until it determines otherwise.

I. DISCUSSION

A. The Initial Comments Filed In Response To The *NPRM* Reaffirm That The Commission Must Continue To Enforce Section 628(c)(2)(D).

The comments filed by terrestrial competitors to cable reestablish several critical points. First, notwithstanding significant challenges in the marketplace, terrestrial competitors are investing enormous resources towards constructing, launching and operating wireline networks capable of delivering video and broadband services equal or superior to those offered by the largest cable multiple system operators ("MSOs").[4] Second, the advent of meaningful terrestrial MVPD competition will deliver unprecedented benefits to consumers, in the form of lower rates and accelerated broadband deployment throughout the country.[5] This comes as no surprise -- Chairman Martin has noted that even in the relatively small number of markets where terrestrial providers have launched service, consumers have benefited from unprecedented price competition

[3] *Id.* § 548(c)(5).

[4] Verizon at 2-4; United States Telecom Association ("USTA") at 3-4; Broadband Service Providers Association ("BSPA") at 2-4; AT&T Inc. ("AT&T") at 2.

[5] Coalition for Competitive Access to Content ("CA2C") at 7-9; Organization for the Promotion and Advancement of Small Telecommunications Companies *et al.* ("OPASTCO") at 2; USTA at 17-18; Qwest at 5-6; Verizon at 5-6.

between the new entrants and incumbent cable operators.[6] The Chairman has also observed that "[t]he ability to deploy broadband networks rapidly . . . is intrinsically linked to the ability to offer video to consumers. . .," since the ability to offer video "'...offers the promise of an additional revenue stream from which [broadband] deployment costs can be recovered.'"[7]

At the same time, terrestrial providers leave no doubt that they cannot compete effectively with incumbent cable operators without access to programming owned or controlled by the cable MSOs, particularly news and sports programming. While the cable interests make much out of the gradual decline in the percentage of programming services that are vertically integrated (glossing over the fact that the total number of cable-owned programming services has actually *increased*),[8] it is indisputable that cable MSOs still hold cognizable ownership interests

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[6] *See, e.g.,* Statement of Chairman Kevin J. Martin re: *in the Matter of Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992; Statistical Report on Average Rates for Basic Service, Cable Programming Service, and Equipment*, MM Docket No. 92-266, Report on Cable Industry Prices, 21 FCC Rcd 15087, 15120 (at fifth paragraph) (2006) ("When consumers have the ability to choose among more than one cable operator, they receive one of the most important benefits of competition that the 1996 Act envisioned: lower prices.") ("2006 Cable Pricing Report").

[7] Statement of Chairman Kevin J. Martin re: *In the Matter of Implementation of Section 621(a)(1) of the Cable Communications Policy Act of1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, MB Docket No. 05-311, Report and Order and Further Notice of Proposed Rulemaking, FCC 06-180 (rel. Mar. 5, 2007), at sixth paragraph (reference omitted).

[8] *See, e.g.,* National Cable & Telecommunications Association ("NCTA") at 5. According to the Commission's most recent annual video competition report to Congress, the number of satellite-delivered networks vertically integrated with at least one cable operator increased from 89 in 2004 to 116 in 2005. *See In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 05-255, Twelfth Annual Report, 21 FCC Rcd 2503, 2575 ¶ 157 (2006).

in a substantial amount of programming (including, *inter alia*, regional sports networks) that is essential to the success of any competitive MVPD offering.[9]

The record also reaffirms that the cable MSOs will withhold critical programming from competitors (terrestrial or otherwise) when provided an opportunity to do so, and, predictably, competitors victimized by such practices have lost market share.[10] Qwest has experienced a similar problem that reveals the preference of a vertically-affiliated programming vendor to decline distribution of programming to MVPDs that are competing against its affiliated cable operators. As discussed in the Declaration of Ben P. Jones, attached hereto, some of Qwest's dealings with iN DEMAND have been marked by delay and obfuscation that have prevented Qwest from acquiring iN DEMAND's sports packages in a timely manner. Not coincidentally, Qwest competes directly for subscribers with two of in DEMAND's MSO owners (Comcast and COX).

In sum, the facts before the Commission confirm that incumbent cable operators have both the incentive and the ability to withhold programming from terrestrial competitors, and thus terrestrial competitors will be exposed to serious and irreparable harm if the Commission does not continue to enforce Section 628(c)(2)(D). The alternative, i.e., permitting the statute to sunset and regulating any anti-competitive consequences after-the-fact, is not a legitimate option for terrestrial competitors or consumers. Indeed, that sort of *post hoc* approach would fly in the face of Congress's mandate that the Commission "*preserve and protect*" competition and diversity in the video marketplace.[11] Given the facts at hand, it is more than reasonable for the

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[9] *See, e.g.,* Verizon at 8-9; CA2C, Attachment A, Part 2; AT&T at 10-12; National Rural Telecommunications Cooperative ("NRTC") at 7; RCN Telecom Services, Inc. ("RCN") at 9-10; BSPA at 6.

[10] *See, e.g.,* USTA at 15-16; RCN at 10-11; CA2C at 15-17; Verizon at 12-14.

[11] 47 U.S.C. § 548(c)(5) (emphasis added).

Commission to conclude that a sunset of Section 628(c)(2)(D) at this time will obstruct terrestrial competition before it has a full and fair opportunity to gain traction in the marketplace, a result precisely the opposite of what the program access law is supposed to achieve."

B. The Cable MSOs Make No Compelling Case For A Sunset of Section 628(c)(2)(D).

As in 2002, the cable interests tie much of their attack on Section 628(c)(2)(D) to the growth of direct broadcast satellite (or "DBS").[13] As in 2002, the Cominission should not take the bait -- both the legislative history of Section 628(c)(2)(D) and the Commission's own precedent confirm that the interests of non-DBS Competitors must be accorded substantial weight when determining whether a sunset of the statute would serve the public interest.[14] Indeed, the plight of terrestrial competitors relative to DBS only reinforces their argument for continued

[12] *See FCC v. WNCN Listeners Guild,* 450 U.S. 582, 594-95 (1981) ("[The Commission's] general rulemaking authority permits the Coinmission to implement its view of the public-interest standard of the [Communications] Act 'so long as that view is based on consideration of permissible factors and is otherwise reasonable.' Furthermore, . . . the Commission's decisions must sometimes rest on judgment and prediction rather than pure factual determinations. In such cases complete factual support for the Commission's ultimate conclusions is not required since ""a forecast of the direction in which future public interest lies necessarily involves deductions based on the expert knowledge of the agency."'" (footnotes and citations omitted)).

[13] *See* Corncast Corporation ("Comcast") at 2, 7-8; Cablevision Systems Corporation ("Cablevision") at 11-12.

[14] *See In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of ihe Communications Act; Sunset of Exclusive Contract Prohibition,* CS Docket No. 01-290, Report and Order, 17 FCC Rcd 12124, 12141-42 (2002). During the floor debate over the program access amendment offered by then Rep. Billy Tauzin (R-La.) that ultimately became Section 628, the United States House of Representatives rejected an alternative amendment from then Reps. Manton (D-N.Y.) and Rose (D-N.C.) (the "Manton-Rose Amendment"), which would have extended full program access protection only to C-band direct broadcast satellite operators. *See* 102nd Cong., 2nd Sess., 138 Cong. Rec. H6487, H6532-33 (July 23, 1992). Furthermore, in refusing to award Court TV an exemption from Section 628(c)(2)(D)'s ban on exclusivity, the Commission emphasized that it is required to "consider the effect of exclusivity on all alternate technology competitors, not just DBS." *In the Matter of*

enforcement of the statute. While DBS subscribership has increased, the subscribership of terrestrial competitors has *decreased* to less than three percent of all MVPD subscribers.[15] The anomaly of tying the outcome of this proceeding to DBS becomes even more obvious in the wake of evidence indicating that terrestrial competition is the superior means of keeping rising cable rates in check.[16]

Also, and again as in 2002, the Commission should reject the cable interests' attempt to turn this proceeding into a referendum on the merits of exclusivity regardless of the medium involved." The text of Section 628(c)(5) plainly does not direct the Commission to conduct an inquiry into the merits of exclusivity across all media. Rather, Section 628(c)(5) only gives the Commission a far narrower directive to determine whether enforcement of Section 628(c)(2)(D) "continues to be necessary to preserve and protect competition and diversity in the distribution of video programming," a condition which the record satisfies here.

While the MSOs contend that exclusivity is necessary to spur MSO investment in programming and ensure creation and development of new cable networks, nowhere do they refute the substantial amount of marketplace data to the contrary.[18] Certainly, the increase in the number of cable-owned satellite-delivered programming services suggests that Section 628(c)(2)(D) has not dissuaded cable operators from investing in programming.[19] The MSOs' argument is also difficult to reconcile with, for example, the success of the Speedvision and

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Time Warner Cable, CSR-4231-P, Memorandum Opinion & Order, 9 FCC Rcd 3221,3228 ¶ 39 (1994).

[15] *See* Twelfth Annual Report, 21 FCC Rcd at 2506-07 & ¶ 9.

[16] *See* 2006 Cable Pricing Report, 21 FCC Rcd at 15087-88 ¶ 2, 15091 ¶ 12.

[17] *See* Comcast at 16-17.

[18] *See, e.g.*, Cablevision at 27-28.

[19] See n. 8, *supra.*

Versus (formerly Outdoor Life) networks, which, notwithstanding the Commission's refusal to give them an exemption from Section 628(c)(2)(D)'s prohibition on exclusivity, have grown to become two of the more popular "niche-oriented" cable channels in circulation.[20] This same is true of the Sci-Fi Channel, which too was denied a Section 628(c)(2)(D) exemption by the Commission yet has succeeded quite well without exclusivity.[21] Likewise, Section 628(c)(2)(D) has had no apparent effect on HBO's substantial and highly successful investments in popular programming such as 'The Sopranos," "Entourage," "Sex and the City," etc., all of which have made HBO one of the most highly demanded cable networks among consumers without the supposed marketplace advantage of exclusive contracts. These examples (and others not discussed here) only confirm what even the MSOs know by now: the success or failure of a cable programming network is not inextricably tied to whether that network is able to enter into exclusive contracts with the cable MSOs. The quality and marketability of a cable network's programming, not exclusivity, ultimately determines whether it will achieve extensive distribution.[22]

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[20] *See In the Matter of Outdoor Life Network and Speedvision Network*, CSR 5044-P, Memorandum Opinion and Order, 13 FCC Rcd 12226, 12231, 12235-36 (CSB, 1998). Similarly, The Golf Channel (a cable-owned programming service) has been extremely successful notwithstanding Section 628(c)(2)(D)'s ban on exclusivity. *See, e.g.*, Umstead, "Niche Sports Nets Show They Have Game," *Multichannel News* (Nov. 26,2001) *at* http://www.multichannel.com.

[21] *In the Matter of Cablevision Industries Corporation and Sci-Fi Channel*, CSR-4278-P, Mernorandum Opinion and Order, 10 FCC Rcd 9786 (CSB, 1995).

[22] Comcast contends that the antitrust laws are sufficient to address any anticompetitive MSO behavior if the Commission were to stop enforcing Section 628(c)(2)(D). *See* Comcast at 23-24. It is well-settled, however, that the Commission's obligation to regulate in the public interest is separate and distinct from the antitrust laws. *See, e.g., In the Mutter of Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Tele-Communications, Inc., Transferor To AT&T Corp., Transferee*, CS Docket No. 98-178, Menioranduin Opinion and Order, 14 FCC Rcd 3160, 3168-69 ¶¶ 13-15 (1999) (footnotes omitted).

II. CONCLUSION

Qwest recognizes that Congress intended to have a sunset of Section 628(c)(2)(D)'s ban on exclusivity at some point in time -- the question before the Commission in this proceeding is whether that time has arrived. The record establishes that the answer is "no." Qwest therefore urges the Commission to issue a clear and unequivocal declaration in this proceeding that enforcement of Section 628(c)(2)(D) "continues to be necessary to preserve competition and diversity in the distribution of video programming," and that the Commission will therefore continue to enforce the statutory provision beyond its scheduled sunset date of October 5, 2007.

Respectfully submitted,

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April 16, 2007

Before the
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In the Matter of	)	
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Implementation of the Cable Television Consumer Protection 2nd Competition Act of 1992	)	
	)	MB Docket No. 07-29
Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act:	)	
	)	
Sunset of Exclusive Contract Prohibition	)	

DECLARATION OF BEN P. JONES

1. My name is Ben Jones. My business address is 1801 California Street, Denver, Colorado 80202. I have worked for Qwest Communications International Inc. ("Qwest") as an employee of Qwest Services Corporation since March 2003. I am currently a Director of Business Development in Product and Marketing and in that role, I am responsible for strategic partner agreements related to Qwest products and cervices. Previously, from September 2005-06, I had responsibility for acquiring programming for Qwest's multi-channel video product, including from iN DEMAND.

2. Since 1999, Qwest has purchased programming through iN DEMAND, a programming vendor owned by three of the nation's largest cable operators, Comcast, Cox, and Time Warner Cable. Qwest offers iN DEMAND's programming services as part of the programming packages for Qwest Choice™ TV. Since 2002, Qwest has purchased movie, event 2nd professional sports programming from iN DEMAND including packages of games from the National Basketball Association ("NBA") and the

National Hockey League ("NHL"). iN DEMAND provided standard terms and conditions to Qwest for the NHL programming in 2002 and for the NBA programming in 2003. Thereafter, for those and subsequent years, iN DEMAND provided purchase orders annually to Qwest by which Qwest purchased the sports programming packages for the relevant season.

3. In 2005, iN DEMAND provided the usual purchase orders for the NHL and NBA sports programming packages, which Qwest completed and returned. In early October 2005. however, less than one week before the start of the NHL's 2005-06 season, iN DEMAND informed Qwest that Qwest would not be eligible to purchase the package of certain NHL games known as the NHL Center Ice Package that it had ordered. iN DEMAND told Qwest that iN DEMAND had just learned that Qwest's video services were distributed using digital subscriber line ("DSL") technology, and that iN DEMAND did not have the rights from NHL to offer the NHL sports programming to companies using DSL technology to provide the programming to customers. This, in spite of the fact that iN DEMAND had to have known since 1999 that Qwest's video services were distributed by DSL, and previously had provided NHL sports programming to Qwest without any distinction based on Qwest's distribution platform.

4. Qwest contacted the NHL directly in an attempt to secure the NHL games for its subscribers. The NHL told Qwest that the NHL had not granted iN DEMAND the right to distribute to telephone companies. When Qwest asked what programming vendor was authorized to distribute the NHL programming to telephone companies the NHL said there was none. Ultimately, the NHL agreed to give iN DEMAND the rights to distribute the NHL Center Ice Package to Qwest for the 2005-06 season. Although this interaction

transpired over two days, the sudden differential treatment of Qwest as a purchaser of video programming was a concern.

5. Then, just a few weeks later, barely a week before the start of the NBA season, Qwest was confronted by nearly the identical circumstances regarding the NBA sports programming. After Qwest had completed the purchase order provided by iN DEMAND, iN DEMAND informed Qwest that Qwest would not be eligible to purchase the NBA League Pass Package Qwest had ordered. iN DEMAND told Qwest that iN DEMAND did not have the rights from the NBA to distribute the NBA League Pass Package to companies that use DSL technology.

6. Qwest contacted the NBA. The NBA told Qwest that the NBA believed iN DEMAND did have the rights to offer the NBA League Pass Package to Qwest. At Qwest's request, the NBA contacted iN DEMAND to convince iN DEMAND that it did have the rights to sell the NBA League Pass Package to Qwest. Finally, after over a week of delay, iN DEMAND agreed to allow Qwest to offer the package for the 2005-06 NBA season. This delay, however, meant that Qwest was unable to offer its subscribers a "free preview" window of the package, which is, arguably, the optimal selling window. As a result, Qwest's sales of the NBA League Pass Package for the 2005-06 season fell far short of expected sales.

I hereby declare that the foregoing is true and correct to the best of my knowledge, information, and belief.

Ben P. Jones

Executed on April 16, 2007

CERTIFICATE OF SERVICE

I, Richard Grozier, do hereby certify that I have caused the foregoing **REPLY COMMENTS OF QWEST COMMUNICATIONS INTERNATIONAL INC.** to be 1) filed with the FCC via its Electronic Comment Filing System in MB Docket No. 07-29; 2) served via e-mail on the FCC's duplicating contractor Best Copy and Printing, Inc. at fcc@bcpiweb.com; and 3) served via First Class United States Mail, postage prepaid, on the parties listed on the attached service list.

/s/Richard Grozier

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